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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

JACOB DANIEL LEWIS et al.

Plaintiffs and Appellants,

v.

YAMAHA MOTOR CORPORATION,  
U.S.A. et al.

Defendants and Respondents.

E052318

(Super.Ct.No. CIVVS801680)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gilbert G. Ochoa, Judge. Affirmed.

Law Offices of Charles S. LiMandri, Charles S. LiMandri, Richard Salpietra, and Teresa L. Mendoza; Law Offices of Fletcher, White & Adair and Paul S. White for Plaintiffs and Appellants.

Bowman and Brooke, Robert K. Miller, Richard L. Stuhlbarg, and Robert S. Robinson for Defendants and Respondents.

## I. INTRODUCTION

Plaintiff Jacob Daniel Lewis purchased an off-road recreational vehicle on April 16, 2007. The same day, Lewis and his friend, plaintiff Patrick Hernandez, were injured when the vehicle hit a berm on a dirt road and overturned. Following a trial of plaintiffs' personal injury action, the jury entered a verdict in favor of defendants Yamaha Motor Corporation, U.S.A., Yamaha Motor Manufacturing Corporation of America, and Seidner Enterprises, LLC. Plaintiffs appeal, contending the evidence was insufficient to support the jury's finding that the vehicle performed as an ordinary consumer would have expected. We find no error, and we affirm.

## II. FACTS AND PROCEDURAL BACKGROUND

In their operative first amended complaint, Lewis and Hernandez alleged causes of action for negligence, breach of express warranty, breach of implied warranty, strict products liability, breach of warranty, strict liability—failure to warn, and negligent infliction of emotional distress. A seven-week jury trial took place.

The evidence at trial established that Lewis, accompanied by Hernandez, purchased a 2007 Yamaha Rhino 660 Sports Edition (the Rhino), a two-person side-by-side off-road recreational vehicle, on April 16, 2007. On the way home, they unloaded the Rhino to try it out on a dirt road. Lewis drove around briefly by himself, and then Hernandez got in. They proceeded down the dirt road to its intersection with Coyote Road, another dirt road at a slightly lower elevation that had berms on both sides. The first berm (the west berm) was about four inches higher than the road plaintiffs were on.

According to defendants' expert witness, Dr. Graeme Fowler, who reconstructed the entire accident sequence, the Rhino hit the west berm at 32 to 35 miles per hour and became airborne so that it cleared Coyote Road and struck the second berm (the east berm). The Rhino again became airborne and traveled another 18 feet before its left front tire struck the ground. The Rhino yawed clockwise and started to roll with the left rear of the vehicle striking the ground. In Dr. Fowler's opinion, in this part of the accident sequence the Rhino's sway bar, left shock absorber and cargo bed were deformed. The Rhino rolled three-quarters of a turn (270 degrees) to the left, and slid, coming to rest on the passenger side 89 to 90 feet east of the east berm.

During the accident, Lewis suffered a traumatic brain injury, among other injuries, and Hernandez suffered a dislocated shoulder.

The evidence established that Lewis was very experienced in riding a variety of types of off-road vehicles. The Rhino was designed for "sport" use and to go safely anywhere an all-terrain vehicle can go with good "terrainability" (the ability to go places other vehicles cannot go). The Rhino's engine was equipped to limit its speed to 39-40 miles per hour.

The Rhino was equipped with a roll cage and seatbelts to protect the occupants during a rollover accident. The Rhino had metal seats with plastic base plates and plastic latches and had plastic seatbelt retractor housings, which were located a quarter-inch to a half-inch behind the seats. The Rhino had three-point seatbelts similar to those used in automobiles, except that the Rhino's seatbelts had cinching latch plates that allowed occupants to lock their lap belts in place. Plaintiffs were wearing their seatbelts properly.

However, they were not wearing helmets, despite instructions to do so in the owner's manual and on warning labels inside the vehicle.

Plaintiffs introduced the testimony of Joseph Awad, an expert in the fields of trauma, biomechanics, accident reconstruction, and injury mechanism analysis.

Plaintiffs' counsel asked Awad to assume that the seatbelt bases and seatbelt retractors broke at the east berm or shortly thereafter. Awad testified that if a person were restrained by the lap belt only, his hips would stay pinned in the seat, but his upper body would be "violently thrown forward" and would "come pendulating out ahead of the vehicle and, as the vehicle came down, it would slap him down." Awad testified that in his opinion, Lewis struck his head on the ground and sustained a head injury "at the initial slap down." Awad opined that Hernandez dislocated his shoulder by reaching out of the vehicle to protect himself during the rollover.

Plaintiffs also introduced the testimony of Stephen Plourd, an accident reconstructionist. In his opinion, the seats broke when the rear wheels hit the east berm, and when the seat bases broke, the seats went back into the seatbelt retractors located a quarter- to a half-inch behind the seats. After that, only the lap portions of the belts were still functional.

After the accident, the driver's side seatbelt retractor was damaged such that it was rendered nonfunctional—it would spool in and out, but would not lock. On the passenger side, the retractor spring broke out of the retractor, and the seatbelt would spool out, but would not retract. The Rhino sustained other damage, including a collapsed rear assembly, deformed shock absorber and sway bar, damaged cargo bed, a torn axle, and a

bent drive shaft. The roll cage “match boxed” and was pushed to the passenger side; a cross-brace for the roll cage suffered some buckling, and the left rear wheel was cambered out.

Andrew Levitt testified for defendants on the issue of vehicle seat performance. He testified that seat parts can break either by compression, i.e., by forces pressing down on the seats; tension, i.e., by forces from underneath the seat pushing up; or by shear; i.e., forces along a plane parallel to the ground. Through testing, he ruled out compression and tension based on the patterns of damage left on the seat. He was able to reproduce damage similar to that shown in post-accident inspections of the passenger side seat, which led him to conclude that shear force had damaged the Rhino’s seats. He stated his opinion that with shear force, the seats would not come into contact with the retractor that broke until long after Lewis could have received his head injury during the rollover sequence. Although plaintiffs’ experts testified that in their opinions the seat latch broke in the east berm, Levitt testified he had not seen any testing done by plaintiffs’ experts that established that the seat latch broke at the east berm. When asked what would happen in terms of seat movement, assuming the seats failed at the east berm, Levitt responded, “At that point, the same thing that’s holding Mr. Lewis in is holding the seat in. He’s got the belt that’s holding him in place. He’s got a cinching latch plate that’s holding him in place. Nothing is really going to move the tabs out of position. You need to have some type of forward or shearing force to move the seat relative to that.”

Eddie Cooper testified for defendants on seatbelt performance. Cooper performed a “spit test,” during which he took a Rhino passenger compartment and turned it upside

down to represent a point during a rollover sequence. He disabled the shoulder portion of the seatbelt so that the only operating portion was the cinching lap belt. His test showed that even under those circumstances, the cinching lap belt kept the occupants inside the vehicle. Moreover, Cooper testified that the shoulder belt would have remained locked so long as the pawl was in the retractor and there was a load on the belt. Plaintiffs had asserted that the driver's seat had moved to the rear, directly striking the retractor. However, Cooper concluded the pattern and nature of damage to the retractor indicated a top-down impact and was inconsistent with an impact with a flat, smooth surface like the back of the driver's seat.

Dr. Harry Smith, a physician and engineer, testified that if the accident had occurred in the manner suggested by plaintiffs' expert, Lewis would have hit his left shoulder before he hit his head; however, the medical reports did not show any bruising to Lewis's left shoulder. Dr. Smith stated his opinion that wearing a helmet would have prevented Lewis's skull fracture, contusion, and subarachnoid bleeding, and he likely would not have been rendered unconscious from the accident. Dr. Smith testified that in his opinion, Lewis hit his head on the "B" pillar (the left rear vertical component of the passenger compartment cage) of the Rhino when the left rear tire contacted the ground, and that occurred before the retractors could have been affected by impact damage. Dr. Smith concluded that Lewis injured his head from contact with "B" pillar, not from contact with the ground. He testified that plaintiffs' expert's theory was implausible, because Lewis would not have survived if he had hit his head at the time and in the manner that expert had postulated. His testing showed that if Lewis had been wearing a

helmet, he would not have received any significant head trauma from striking the “B” pillar.

Based on Fowler’s work on the spit device, which included replicating the angle of the Rhino when the left rear wheel came down, Dr. Smith determined that at that point of the crash sequence, Lewis’s body would have been leaning up and to the rear, and Dr. Smith demonstrated that body position to the jury. He explained that Lewis’s seatbelt would not have affected how his body moved toward the rear in the accident.

Dr. Smith disagreed with Awad’s opinion about the cause of Hernandez’s shoulder dislocation. In Dr. Smith’s opinion, if Hernandez had been reaching out of the vehicle as Awad posited, the force would likely have caused a broken wrist or a posterior dislocation of the shoulder, not the anterior dislocation Hernandez actually suffered.

Following the presentation of evidence, the parties stipulated that plaintiffs did not claim a defect in the handling and stability of the Rhino; the jury could not consider the handling and stability of the Rhino in its deliberations, and the jury could not find that the Rhino was defective because of its handling and stability or that the handling and stability of the Rhino was the cause of injury to plaintiffs.

Over defendants’ objection, the trial court instructed the jury, based on CACI No. 1203: “[Plaintiffs] claim the Yamaha Rhino’s design was defective because the Rhino did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [plaintiffs] must prove all of the following:

“No. 1. That the defendants manufactured, distributed, or sold the Rhino.

“No. 2. The Rhino did not perform as safely as an ordinary consumer would have expected.

“No. 3. That the Rhino was used in a way that was reasonably foreseeable to the defendants; and

“No. 4. That the Rhino’s failure to perform safely was a substantial factor in causing [plaintiffs’] harm.”

On the verdict form, which tracked that instruction, the second question was, “Did the Rhino fail to perform as safely as an ordinary consumer would have expected?” In a 9-to-3 verdict, the jury responded “No” to the second question and therefore did not proceed to the remaining questions. Judgment was thereafter entered in favor of defendants.

### III. DISCUSSION

#### A. Standard of Review

We apply the substantial evidence standard of review to plaintiffs’ claim that the evidence was insufficient to support the jury verdict. (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, superseded by statute on another ground as noted in *DeBerard Properties, Ltd. v. Lim* (1999) 20 Cal.4th 659, 668.) In applying that standard, we “view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .” [Citation.]” (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) In addition, we interpret the verdict “so as to uphold it and to give it the effect intended by the jury, as

well as one consistent with the law and the evidence.’ [Citation.]” (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1223.)

## **B. Product Liability Based on Design Defect**

A manufacturer, distributor, or retailer is liable in tort if a defect in its product causes injury while the product is being used in a reasonably foreseeable way.

(*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62.) A product is defective in design if either (1) “the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner,” or (2) “the benefits of the challenged design do not outweigh the risk of danger inherent in such design.” (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418 (*Barker*). The first design defect test, the consumer expectation test, is at issue in this appeal. That test is appropriate when the defect “is apparent to the common reason, experience, and understanding of its ordinary consumers.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 569 (*Soule*).)

A prima facie case under the consumer expectation test requires evidence of (1) the plaintiff’s use of the product; (2) the circumstances surrounding the injury; and (3) the objective features of the product that are relevant to an evaluation of its safety. (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 127.) In *Soule*, the court reiterated that “the consumer expectations test is appropriate only when the jury, fully apprised of the circumstances of the accident or injury, may conclude that the product’s design failed to perform as safely as the product’s ordinary consumers would expect.” (*Soule, supra*, 8 Cal.4th at p. 569, fn. 6.) Once the plaintiff has made a prima facie

showing, the fact finder employs “““[i]ts own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence.””” (Pannu v. Land Rover North America, Inc. (2011) 191 Cal.App.4th 1298, 1310.)

### **C. Analysis**

Plaintiffs’ argument is simple: They contend the evidence was undisputed that the seatbelt system failed, and no evidence would support a conclusion that an ordinary consumer would expect the seatbelt system to fail.

As plaintiffs acknowledge, Cooper testified that the lap belts held the occupants in place even with the shoulder belt disabled, and in Cooper’s opinion, the failure of the seatbelt system did not cause plaintiffs injuries. Moreover, Levitt and Smith both stated their opinions that the retractor broke *after* Lewis’s head injury occurred. Plaintiffs argue, however, that such evidence went to causation, and the jury could not consider causation until it reached Question No. 4 of the special verdict form, and if the jury did so, it failed to follow instructions.

We reject plaintiffs’ argument. The jury was not asked in question No. 2 *if the seatbelt system failed*; rather, it was asked if the Rhino “fail[ed] to perform as safely as an ordinary consumer would have expected.” The jury could reasonably interpret the question as encompassing whether the safety systems in the Rhino protected the occupants during the accident sequence as they were intended to do. If the jury accepted the testimony of Cooper that the seatbelts maintained their tension despite the breakage and/or accepted the testimony of Levitt and Smith that the retractor broke after Lewis’s

head injury occurred, the jury could reasonably conclude the seatbelts “performed” as an ordinary consumer would expect even if they were inoperable after the accident.

As noted, we must interpret the verdict ““so as to uphold it and to give it the effect intended by the jury as well as one consistent with the law and the evidence.” [Citation.]” (*All-West Design, Inc. v. Boozer, supra*, 183 Cal.App.3d at p. 1223.) We conclude that under the instruction given, the jury could reasonably treat the issue of the seatbelts’ performance as being inextricably tied to a causation analysis: The jury could conclude that the seatbelts performed as a reasonable person could expect if in fact they continued to secure the occupants inside the vehicle even after the breakage occurred and that plaintiffs’ injuries were not attributable to the breakage. That theory of the case is amply supported by defendants’ expert testimony. We therefore conclude substantial evidence supports the jury’s verdict.

#### **D. Defendants’ Expert Testimony**

Plaintiffs argue, however, that defendants’ expert testimony did not constitute substantial evidence. Citing *Soule*, plaintiffs contend that expert testimony is irrelevant to the consumer expectation standard.

Contrary to plaintiffs’ position, the court in *Soule* did not hold that *all* expert testimony is irrelevant to the consumer expectation standard; rather, the court held that “The manufacturer may not defend a claim that a product’s design failed to perform as safely as its ordinary consumer would expect by presenting expert evidence of *the design’s relative risks and benefits*” (*Soule, supra*, 8 Cal.4th at p. 566, fn. omitted, italics added) and further stated that “expert witnesses may not be used *to demonstrate what an*

*ordinary consumer would or should expect.*” (*Id.* at p. 567, italics added.) Thus, under *Soule*, expert testimony in a consumer expectations case is admissible for other purposes, such as to explain the circumstances of an accident.

For example, in *Aetna Casualty & Surety Co. v. Farmers Brothers Co.* (1998) 65 Cal.App.4th 574, 578, a products liability design defect case presented under the consumer-expectations theory, the court held that the jury was free to accept the testimony of the plaintiff's expert that the heating element of a coffeemaker reached a sufficient temperature to ignite a plastic handle, and to reject the testimony of a defense expert that the heat was not sufficiently high to cause the fire that destroyed a restaurant. Similarly, in *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1668, the court held that the evidence was sufficient to establish that “Light” cigarettes were a defective product under the consumer-expectations test when an expert testified that the cigarettes actually delivered more nicotine and tar per cigarette to smokers because smokers compensated for less nicotine by inhaling deeper, drawing more dangerous carcinogens into their lungs without their being aware of it.

Here, the expert testimony about which plaintiffs now complain did not relate to either of those issues set forth in *Soule*, i.e., “the design’s relative risks and benefits” or “to demonstrate what an ordinary consumer would or should expect.” (*Soule, supra*, 8 Cal.4th at pp. 566-567.) The challenged testimony and was therefore relevant and admissible.

Finally, plaintiffs challenge the specific testimony of defendants' seatbelt expert, Eddie Cooper, that if there was tension on the seatbelt, it would not have unlocked.<sup>1</sup> Plaintiffs assert that Cooper never explained the factual basis for his conclusion, and defendants never proffered a factual basis for the conclusion. Plaintiffs rely on *Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108. In that case, the plaintiff in a medical malpractice action appealed on the ground, among others, that the trial court had erred in excluding the testimony of the plaintiff's medical expert on causation. The trial court had granted the defendants' motion to strike the expert's testimony on the ground "it was based on factual assumptions without evidentiary support," and was too speculative to establish causation. (*Id.* at p. 1116.) On appeal, the

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<sup>1</sup> The exchange, during cross-examination of Cooper, was as follows:  
"Q I think we established both the seats[,] the seat bases and the seat belt retractors broke or were damaged in this accident; right?  
"A Correct.  
"Q The driver's side retractor was rendered non-functional; isn't that correct, in as much [as] it would spool out but not lock?  
"A Ultimately in the end, yes.  
"Q Okay.  
"A Some point after the accident perhaps. I don't really know.  
"Q Well, once the retractor broke, it may have stayed locked but only until there's a little bit of tension eased up, then it would unlock and not lock again, right?  
"A Not necessarily. The paw[l]s are free to move because of the damage to that retractor the cam that's re engaged or—sorry—disengage them are also damaged. So if there's an acceleration field that would cause them to fall into the teeth, they would lock again."  
Cooper also explained his opinion as to how the retractors were damaged: ". . . I think both retractors were contacted by the outboard aft tab by the structural base of the seat doing the damage that we see today sometime in the later stages of the accident."  
The exchange continued:  
"Q Have you reached an opinion as to whether or not, even if that damage was done, the retractor on the driver's side would have unlocked?  
"A If it had tension on it, which I think it did, it would not have unlocked. Those paw[l]s would still have been in place, I believe, and would have reacted."

court affirmed the ruling, holding that the opinion testimony was not supported by a reasoned explanation. (*Id.* at pp. 1120-1121.) Here, plaintiffs did not object to or move to exclude the testimony they now challenge, and *Jennings* is therefore inapplicable. We conclude Cooper’s opinion testimony was admissible.

#### IV. DISPOSITION

The judgment is affirmed. Costs are awarded to defendants and respondents.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

CODRINGTON

J.